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No. 05–1575

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, ET. AL.,

Petitioners,

vs.

JEFFREY TIMOTHY LANDRIGAN, A.K.A.
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This Court granted certiorari to decide two questions: (1) In light of the highly deferential standard of review required under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing?", and (2) Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation evidence and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

Landrigan's Brief on the Merits attempts to complicate a relatively uncomplicated analysis. Landrigan sidesteps the two issues before the Court and argues instead that the only issue that should be considered is whether the Ninth Circuit erred in ordering an evidentiary hearing. (Resp. Br. at 19.) He argues that his current allegations create a "colorable claim" entitling him to an evidentiary hearing, and that the AEDPA does not affect that analysis. (*Id.* at 32-34.)

Landrigan's arguments fail because, in this collateral review proceeding brought under 28 U.S.C. § 2254, the proper analysis does not turn on his current allegations, but rather on whether the state court unreasonably determined the facts or unreasonably applied clearly established federal law in rejecting

Landrigan's ineffective assistance of counsel claim.

The state court found that Landrigan instructed his attorney not to present any mitigating evidence at sentencing. That factual finding was entitled to deference under the AEDPA.

The state court's interpretation of Landrigan's statements at the time of sentencing was reasonable, and is further supported by the fact that Landrigan did not subsequently claim on appeal or in his post-conviction proceeding that his statements had been misconstrued or were somehow involuntary. The record before the trial court at the time of Landrigan's post-conviction proceeding fully supports the trial court's factual determination that Landrigan instructed his attorney not to present any mitigation, and that his "new-found sense of cooperation" in alleging that he would have allowed presentation of evidence of a biological/organic predisposition to violence was not believable.

The Ninth Circuit's refusal to defer to the state court's factual finding is particularly inappropriate here because that finding was made by the same judge who had previously presided over Landrigan's trial and sentencing. In addressing Landrigan's post-conviction claim, the trial judge was uniquely qualified to assess the context of Landrigan's statements at sentencing, and her assessment of Landrigan's credibility is entitled to great deference.

Because the trial court found that Landrigan chose not to present mitigation evidence and that his assertion that he would have cooperated in presenting one type of mitigation evidence was not credible, there was no need for an evidentiary hearing in state or federal court. No additionally-developed mitigation evidence would have created a basis for finding that the result

of the sentencing proceeding would have been different because Landrigan would not have allowed his attorney to present the evidence at sentencing.

Finally, even assuming the state court's assessment that Landrigan did not want to present *any* mitigation does not resolve his ineffective assistance of counsel claim, the Ninth Circuit erred by granting relief because the evidence Landrigan now proffers is not compelling mitigation. Landrigan repeatedly asserts that the evidence he now seeks to develop is the type of evidence that would have affected the sentencer's decision. However, the very judge who sentenced Landrigan also considered his post-conviction claim and rejected it as "frivolous" notwithstanding Landrigan's allegation of a genetic predisposition to violence. Additionally, the Arizona Supreme Court, having previously independently reviewed and affirmed Landrigan's death sentence on direct review, declined review of the post-conviction ruling. The state courts' determination that Landrigan's ineffective assistance claim was "frivolous" refutes Landrigan's assertion that his additional mitigation evidence would have changed the outcome of the sentencing proceeding.

The state court's resolution of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of federal law as set forth by this Court. Under any standard of deference, much less the highly deferential standard required under the AEDPA, the state court ruling should stand.

STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case set forth in their Brief on the Merits.

Landrigan suggests that this case involves a relatively benign murder, with the trial judge imposing a death sentence despite having concluded that "the nature of the murder [] is really not out of the ordinary when one considers first degree murder." (Resp. Br. at 5-6.) That characterization ignores, however, the trial judge's subsequent comments, in which she stated that Landrigan is an "exceptional" defendant who stands out as an "amoral person" with "no scruples and no regard for human life." (Pet. App. D at 23.)

ARGUMENTS

I. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Rejected the State Court's Factual Finding that Landrigan Instructed His Defense Attorney not to Present any Mitigating Evidence.

Landrigan suggests that deference under 28 U.S.C. § 2254 to state court factual findings is not at issue here because the Ninth Circuit did not definitively hold that Landrigan did not waive his right to present any mitigating evidence. (Resp. Br. at 43, n. 15.) However, he ignores the following language from the Ninth Circuit ruling:

> The state supreme court found that, "[a]t the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence." And the state habeas court similarly found that

> Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." In light of what actually transpired at the sentencing hearing, such an overly broad characterization of the colloquy is not supported by the record and thus amounts to an "unreasonable determination of the facts." 28 U.S.C § 2254(d)(2).

(Pet. App. A at 15-16.) The Ninth Circuit thus unequivocally treated the trial court's ruling that Landrigan instructed his attorney not to present any mitigating evidence as a factual finding.

Landrigan nevertheless argues that he is entitled to an evidentiary hearing because he "has alleged that any purported waiver was not knowing and intelligent, and that he intended at most to forgo his right to put on his ex-wife and birth mother as witnesses." (Resp. Br. at 20.) Landrigan's argument fails because there is a reasoned basis for the state court's factual finding and because Landrigan never alleged at sentencing or during his post-conviction proceeding that his decision not to present any mitigating evidence was not knowing and intelligent. Nor did he allege that he intended at most to forgo his right to call his ex-wife and birth mother as witnesses. Landrigan's petition for post-conviction relief made no such assertions, and his affidavit avowed only that he would have cooperated in developing evidence of a biological component to violence.[1]

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[1]Landrigan's only assertion that his waiver may have been involuntary was in a motion for rehearing from the denial of his post-conviction petition. (JA 99, 102). The motion did not include any type of affidavit or avowal from Landrigan supporting that assertion. Under Arizona (Continued)

Noticeably absent from Landrigan's affidavit is any avowal that Landrigan did not mean what he said at sentencing or that his statements were misconstrued.[2] Because the defendant bears the burden of establishing the basis for a post-conviction claim, the absence of any indication that Landrigan's decision not to present mitigating evidence was involuntary further supports the trial court's factual conclusion that Landrigan instructed his attorney not to present *any* mitigating evidence.

Furthermore, the evidence developed by Landrigan's federal habeas counsel further supports the conclusion that Landrigan waived presentation of *all* mitigation evidence, not just testimony from two family members. The "new" evidence developed in federal court included a 10-page report (J.A. at 129) prepared prior to sentencing by a mental health expert, Dr. Mickey McMahon, who had examined Landrigan prior to sentencing at counsel's request. The report detailed information about Landrigan's family background, including information about possible in-utero drug use by Landrigan's birth mother, and information that Landrigan's birth father had served time in

(Continued).

law, however, a defendant cannot raise new issues in a motion for rehearing. *State v. Byers*, 613 P.2d 299, 302 (Ariz. App. 1980), *overruled on other grounds*, *State v. Pope*, 635 P.2d 846 (Ariz. 1981).

[2] The relevant portion of Landrigan's affidavit states:

8. That despite the foregoing trial counsel did not discuss with Petitioner, nor to his knowledge consider presenting testimony regarding the biological component of violence, as mitigation evidence at sentencing.
9. That had trial counsel raise this aspect of mitigation evidence with him, Petitioner would have cooperated in presenting that evidence and, on information and belief, Mr. Darrel Hill would also have cooperated.

prison and had a history of physically abusing and trying to kill Landrigan's mother. (*Id.*) Thus, prior to sentencing, Landrigan's counsel had significant information (in addition to what was set forth in the presentence memorandum) that could have been presented at sentencing. This evidence need not have been admitted exclusively through Landrigan's birth mother or ex-wife. In fact, Landrigan could have established these facts through his own testimony. Thus, it was not unreasonable for the state court to conclude that Landrigan's statement to the court that he did not want any mitigation to be presented included information beyond testimony from two family members.

The state court's conclusion that Landrigan did not want counsel to present *any* mitigation evidence at the time of sentencing is not only "supportable," it stands as the most logical conclusion based on the record at sentencing and the record developed in the post-conviction proceeding and in federal court. *See also Landrigan v. Stewart*, 272 F.3d 1221, 1225 (9th Cir. 2001) ("In the constellation of refusals to have mitigating evidence presented, . . . this case is surely a bright star.").

The state court's conclusion was not an unreasonable interpretation of the facts under any standard of review. The trial court's assessment that Landrigan was not believable in asserting that he would have allowed counsel to present one type of mitigation evidence is similarly supported by the record. First, the same judge who had presided over Landrigan's trial and sentencing proceedings made this credibility assessment. That fact is significant. *See Williams v. Taylor*, 529 U.S. 362, 396-97 (2000) (rejecting state supreme court's assessment of a lack of *Strickland* prejudice and noting that "the very judge who presided at Williams' trial, and who once determined that the death penalty was 'just' and 'appropriate,' concluded that there

existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence."). Second, Landrigan's statements and conduct at sentencing left little question as to his wishes and support the trial judge's assessment of Landrigan's credibility at the post-conviction stage. The trial judge's factual finding that Landrigan instructed his attorney not to present *any* mitigating evidence should be upheld.

II. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Found that the State Court's Ruling was an Unreasonable Application of Clearly Established Federal Law.

The relevant inquiry on federal collateral review is whether the state court's analysis of Landrigan's ineffective assistance of counsel claim reasonably applied controlling federal law as determined by this Court. 28 U.S.C. § 2254(d)(2). The state court analyzed Landrigan's claim under clearly established federal case law, citing to *Strickland* and noting that ineffective assistance of counsel may be established by demonstrating (1) that counsel's conduct fell below an objective standard of prevailing professional norms and (2) that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's deficient performance. (Pet. App. F at 4.)

The state court's rejection of Landrigan's ineffective assistance of counsel claim was not unreasonable under any standard, much less the "doubly deferential" standard required under the AEDPA when review is conducted through the lens of federal habeas. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Because Landrigan did not want counsel to present *any* mitigation evidence at sentencing, he cannot satisfy the prejudice prong with regard to any conceivable mitigation he

now claims counsel should have been developed. Thus, the state court's denial of his ineffective assistance claim was not an unreasonable application of *Strickland*.

Landrigan characterizes the state court's ruling as simply "express[ing] skepticism about Landrigan's Sixth Amendment claim." (Resp. Br. at 8.) He suggests that the state post-conviction court did not resolve this claim on the merits because the state court also ruled that the claim was procedurally barred. (*Id.*) Landrigan further argues that "the ultimate merits inquiry" cannot be carried out until there is further factual development.

Landrigan's characterization of the state court's ruling is inaccurate because the court did more than express skepticism about Landrigan's Sixth Amendment claim. The state court expressly rejected the claim on the basis that, "[s]ince the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not 'explore additional grounds for arguing mitigation evidence.'" (Pet. App. F at 4.) The state court further referred to the claim as both "frivolous" and precluded. (*Id.* at 5.)

The appropriate analysis on federal collateral review does not turn on any specific legal ruling by a state court, but rather on whether the state court resolved a constitutional claim in a manner that unreasonably applied clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d)(2). Here, the state court resolved Landrigan's constitutional claim by denying it after applying *Strickland*. That denial is consistent with clearly established federal law as determined by this Court.

Further factual development is unnecessary. Based on the evidence before the trial judge when she considered Landrigan's petition for post-conviction relief, there was no reason to hold an evidentiary hearing. Taking as a given that Landrigan would testify in a post-conviction proceeding that he would have cooperated in presenting evidence of a genetic predisposition to violence, the trial judge nevertheless rejected Landrigan's assertion because it was not believable in light of his statements and conduct at sentencing. An evidentiary hearing to develop additional mitigation evidence was thus unnecessary because it would not have affected the ultimate resolution of Landrigan's ineffective assistance of counsel claim.

Landrigan incorrectly states that Petitioners did not argue to the Ninth Circuit that § 2254(e)(2) precluded an evidentiary hearing in Landrigan's case, (Resp. Br. at 26), and that Petitioners "effectively concede[] that § 2254(e)(2) does not preclude a hearing because Landrigan diligently sought, and was denied, the opportunity to make his factual case in state post-conviction proceedings." (Resp. Br. at 19.) Petitioners expressly objected under § 2254(e)(2) to Landrigan's attempt to develop evidence in federal court that was not presented to the state courts. (Respondents-Appellee's Answering Brief, filed Feb. 12, 2001, at 40.) Petitioners have never conceded that a hearing is appropriate under § 2254(e)(2), and have instead consistently maintained that Landrigan's express instruction not to present mitigating evidence at sentencing obviated the need for an evidentiary hearing to develop mitigating evidence.

In Arizona, a defendant who files a petition for post-conviction relief is not entitled to an evidentiary hearing unless he raises a "colorable" claim. *See* Ariz. R. Crim. P. 32.6; *State v. Borbon*, 706 P.2d 718, 725 (Ariz. 1985). Factual allegations must be supported by affidavits, setting forth what an alleged

witness would testify to at an evidentiary hearing. *Borbon*, 706 P.2d at 725. Because the only type of evidence Landrigan avowed he would have permitted counsel to present was evidence of a genetic predisposition to violence, Landrigan was not diligent in attempting to develop any other type of evidence in state court.

In any event, the remand for a hearing was unnecessary because the evidence Landrigan now proffers lacks mitigating value. Landrigan asserts that "the allegations and evidence presented thus far are of exactly the kind that could influence a sentencer to impose a sentence of life imprisonment rather than death," (Resp. Br. at 33.) However, the very judge who sentenced Landrigan was unmoved by Landrigan's post-conviction claim that counsel should have presented evidence of a genetic predisposition to violence. Furthermore, the evidence Landrigan seeks to develop helps establish that he has an antisocial personality disorder, with personality traits that the Arizona Supreme Court found *unfavorably* distinguished Landrigan from other defendants and supported the imposition of the death penalty. (J.A. at 65.) Thus, the evidence Landrigan seeks to develop would not have changed the sentencing outcome.

The state court's resolution of Landrigan's ineffective assistance of counsel claim is entirely consistent with this Court's *Strickland* jurisprudence. In *Strickland*, this Court reiterated that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own actions. 466 U.S. at 691. In *Williams*, this Court noted that the proper focus of federal habeas review is not a search for any constitutional error, but rather for "errors that undermine confidence in the fundamental fairness of the state adjudication." 529 U.S. at 375. This Court further noted that a claim of ineffective assistance of counsel must be based on the

deprivation of a substantive or procedural right to which a defendant is entitled. *Id.* at 393. There is no constitutional prohibition against waiving mitigation, and no constitutional requirement to present mitigation evidence over a defendant's objection. *See Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990). Nor is there a constitutional requirement that any particular colloquy be followed in assessing how much, if any, mitigation a defendant chooses to present. Given Landrigan's clear objection to presentation of mitigation evidence and his active interference with counsel's attempts to present favorable information to the sentencing court, there is nothing fundamentally unfair about the state court's ruling denying Landrigan's ineffective assistance of counsel claim.

Landrigan's assertion that *Williams*, *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), support his position is unpersuasive. Most obviously, yet ignored in Landrigan's analysis, the defendants in those cases did not forgo presentation of mitigation or affirmatively undermine their attorneys' efforts to present mitigation evidence.

In *Williams*, defense counsel failed to obtain records describing Williams' "nightmarish childhood" because counsel wrongly believed that state law denied them access to the records. 529 U.S. at 395. Williams' counsel also failed to introduce available mitigating evidence, or to seek readily available information that might have benefited him. *Id.* at 396. In contrast, Landrigan's counsel had a mental health expert examine Landrigan, and counsel submitted a presentence memorandum detailing mitigating factors, which included information about Landrigan's prior substance abuse problems and difficult family background. (J.A. at 16-52.) Landrigan's counsel also brought Landrigan's biological mother and ex-wife

to the sentencing hearing; those witnesses did not testify only because Landrigan insisted that they not do so.

Williams also differs from Landrigan's case because the same judge who heard the testimony presented at Williams' sentencing hearing considered Williams' post-conviction claim and found that there was "a reasonable probability" that Williams would not have received the death penalty had the jury heard the mitigating evidence his counsel failed to present. *Id.* at 397. In contrast, the original trial judge in this case considered Landrigan's post-conviction claim and rejected it as "frivolous."

In *Rompilla*, the deficiency in counsel's performance stemmed from counsel's failure to examine the court file pertaining to Rompilla's prior conviction, which was the basis for an aggravating circumstance central to the prosecutions penalty phase case. 125 S.Ct. at 2470 (J. O'Connor, concurring). Here, defense counsel attempted to mitigate the aggravating value of Landrigan's prior conviction by bringing in Landrigan's ex-wife to place a more favorable spin on the facts underlying that offense. However, Landrigan prevented his ex-wife from testifying, and he contradicted his attorney's assertions that Landrigan had acted in self-defense.

In *Wiggins*, counsel (rather than the defendant) made a "decision to limit the scope of their investigation into potential mitigating evidence." 539 U.S at 521. In contrast, Landrigan instructed his attorney not to present mitigation witnesses, and actively interfered with his attorney's efforts to put any mitigating information before the court. Furthermore, while this Court characterized the mitigation evidence that Wiggins' counsel failed to discover and present as "powerful," *id.* at 535, the only additional mitigation that Landrigan avowed he would have allowed was evidence of a genetic propensity for violence.

Such evidence, even if scientifically plausible, cuts both ways, and provides little mitigating value.

Finally, the fact that the Ninth Circuit's "only holding" is the granting of an evidentiary hearing, (*see* Resp. Br. at 1), does not change the analysis. In *Williams*, this Court noted that Congress, by enacting the AEDPA, evidenced an intent to heighten the deference afforded state court factual and legal determinations and to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U.S. at 386. This case has been in the federal courts for over 10 years. Ordering an evidentiary hearing to develop evidence that would not have affected the sentencing decision is not only pointless, but defeats the intent and purpose of the AEDPA. Because the state court's factual determination that Landrigan instructed his attorney not to present any mitigation evidence was not an unreasonable factual finding, an evidentiary hearing is unwarranted. The Ninth Circuit's ruling should be reversed.

CONCLUSION

For these reasons, the State respectfully requests that this Court reverse the judgment of the Ninth Circuit and order that Landrigan's federal habeas petition be denied with prejudice.

Respectfully submitted

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